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Supreme Court of the United States

OCTOBER TERM, 1923.

No. 669

THE UNITED STATES OF AMERICA,

Petitioner,

v.

LEIB RITTERMAN.

RESPONDENT'S BRIEF.

ALBERT [illegible] C. BARNES, JR.,
Counsel.

INDEX.

PAGE

Brief of Respondent 1

Statement 1

Summary of Argument 2

Argument 2

AUTHORITIES CITED.

Kock v. United States, 172 U. S., 434 2

Newman v. United States, 276 Fed., 798 2

Section 593 (a) Tariff Act 1922 3

Revised Statutes, Sec. 2865 2

MISCELLANEOUS.

Customs Regulations 1923 1

Article 205 1

Article 402 1

Treasury Decisions 39867 1

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THE UNITED STATES,
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LEIB RITTERMAN.

RESPONDENT'S BRIEF.

Statement.

For his formal statement of facts, the respondent relies entirely on the statement in the opinion of the Circuit Court of Appeals (R., 77).

In the case at bar, regulations pertaining to passenger's baggage require that it shall be retained in customs custody until arrival "at the first port of entry" in the United States. Customs Regulations 1923, Art. 205, Art. 402. The first port of entry was St. Albans, Vermont (R., 20 and see T. D. 39867 abolishing Highgate and Swanton, and establishing the port of St. Albans). It was not until that time that any official entry could be made. It was at that time the customs officials deprived the respondent of the opportunity to make such entry by taking his baggage from the train, unknown to him, and concealing it in the Custom House in a place removed from that in which the respondent was held (R., 17-24-27-29-31-34). All of which was contrary to the law as set forth in the Treasury regulations which require that the baggage shall be

opened by the passenger in the presence of the Customs Officers. Customs Regs. 1923, Art. 205, Sec. 461, Tariff Act of 1922.

Summary of Argument.

1. Section 593, Tariff Act of 1922, is a substantial re-enactment of Section 2865, Revised Statutes and for the purposes of this action is exactly similar.

2. Smuggling or clandestine introduction was defined in Keck v. United States, 172 United States, 434, and that definition has never been questioned.

3. The Customs Officers did not comply with the law in apprehending the respondent and seizing his baggage.

4. The Circuit Court of Appeals reviewed the case of Newman v. United States, 276 Fed., 798 and expressly distinguished it from the case at bar.

Argument.

An "attempt to smuggle" is not a crime within any of the statutes of the United States.

The crime of smuggling as set forth in the statutes was fully defined in Keck v. United States, 172 United States, 434, as the clandestine introduction of merchandise without the payment of duties thereon. Entirely apart from the phraseology of Section 2865 of the Revised Statutes this crime of smuggling, as defined in the Keck case, included the failure to pay or account for duties. That case was decided upon two theories: First, that the statute did not include mere attempts to commit the crime of smuggling, and Second, that the clandestine introduction must be without paying or accounting for the duty. In view of the discussion of the definition of smuggling or clandestine introduction in that case, it is obvious that the decision would have been the same had the statute not contained the words, "without paying or accounting for the duty."

In the Keck case, *supra*, at page 445, this court said:

> "From the first of the foregoing conclusions it follows that mere acts of concealment of merchandise on entering the waters of the United States however preparatory they may be and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction."

Section 593 of the Tariff Act of 1922 being a substantial reenactment of Section 2865, of the Revised Statutes omitted the words "without paying or accounting for the duty," presumably upon the theory that smuggling or clandestine introduction had been defined in Keck v. United States, *supra*, and that such definition included, as a necessary part of the crime, failure to pay or account for duties. This definition has been the law for over twenty years.

The decision of the Circuit Court of Appeals is certainly not in conflict with its own decision in Newman v. United States, 276 Fed., 798. On the facts it was distinguished by that court from the case at bar (R., 82).

It is therefore respectfully submitted that the petition should be denied.

Respectfully submitted,

ALBERT MACC. BARNES, JR.,
of Counsel.

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IN THE

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OCTOBER TERM—1926.

No. 669.

UNITED STATES OF AMERICA,

Petitioner,

v.

LEIB RITTERMAN.

BRIEF FOR RESPONDENT.

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PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

INDEX

	PAGE
Opinion below	1
The Statute	1
Statement of the Case	2
The Indictment	2
Facts	3
The Questions Before the Court	6
Summary of the Argument	7
Argument	10
Appendix	35

AUTHORITIES CITED.

Cases:

Keck v. United States, 172 U. S., 434	6
United States v. Eaton, 106 U. S., 486	20
United States v. Standard Brewing Co., 251 U. S., 210	20
Latimer v. United States, 223 U. S., 501	15
United States v. One Pearl Chain, 139 Fed., 510, 513	25
United States v. One Pearl Necklace, 111 Fed., 164	27
United States v. One Trunk, 184 Fed., 317	27
United States v. Smith, 2 Blatchford, 127, 27 Fed. Cases No. 16319	30
United States v. Nolton, 5 Blatchford, 427, 27 Fed. Cases No. 15,897	30
Dodge v. United States, 131 Fed., 849	28
Newman v. United States, 276 Fed., 798	28

aiders or abettors, shall be fined in any sum not exceeding $5,000 or imprisoned for any term of not exceeding two years, or both, at the discretion of the court.

STATEMENT OF THE CASE.

The Circuit Court of Appeals unanimously reversed the conviction and held that on the evidence there was reversible error in the instructions given the jury (R., 83); that the facts did not constitute the offense of smuggling under Section 593 (a), Tariff Act of 1922 (R., 79); that it was erroneous to adopt said section as the basis of the indictment on the evidence in this case (R., 83).

The Indictment.

Count 3 of the indictment, the only one submitted to the jury is as follows (R., 2):

> "Count 3. Lieb Ritterman of Antwerp, Belgium, on, to wit, the 28th day of January, A. D. 1926, at the towns of Highgate and Swanton, and at the City of Saint Albans, all in the County of Franklin, State and judicial district of Vermont, and within the jurisdiction of this court, did then and there unlawfully, wilfully, knowingly, and feloniously, with intent to evade payment to the United States of America of certain duties on certain merchandise, to wit, one thousand and twenty-two and eighty-five hundredths (1,022.85) carats of unset cut diamonds, of great value, to wit, one hundred twenty-two thousand four hundred ninety-two dollars and forty-three cents ($122,492.43) contained in one leather Gladstone bag, subject to the payment of duties to said United States, and thereby defraud said United States and the revenue thereof, smuggle and clandestinely introduce into said United States from a foreign country, to wit, the

Dominion of Canada, said merchandise, consisting of said one thousand twenty-two and eighty-five hundredths (1,022.85) carats of unset cut diamonds without making any declaration at any customs office of said United States, or to any customs officer of said United States, to enter said diamonds into said United States, and without causing said diamonds to be invoiced for the purpose of ascertaining the duties on said merchandise, consisting of said diamonds, at any customs office of said United States or by any customs officer of said United States, and without paying or accounting for the duties to which said merchandise, consisting of said diamonds, was then and there subject, although said Leib Ritterman had an opportunity to do so; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

Facts.

On January 28, 1926, respondent went to the station of an international railroad in Montreal, Canada, carrying with him two hand bags, bought a ticket for New York, and took one of the hand bags, known in this case as the Gladstone bag, to the baggage room for checking to New York (R., 11, 12). A United States Customs Inspector asked him if the bag contained his personal effects and he answered affirmatively (R., 13). He was requested to open the bag and did so, and this United States Customs Inspector made an examination of the contents. The bag was closed and locked and corded and sealed with a United States Customs Seal (R., 12), the key and a baggage check handed to respondent who then proceeded (R., 13) to the train with the other small hand bag in his possession. Between Montreal, Canada, and St. Albans, Vermont, both on Canadian (R., 16) and United States territory (R., 17), respondent was asked by customs officers whether he had

anything to declare and in the case of each such inquiry answered "No." He was asked to open his baggage, and whether he had anything to declare, and he pointed to the small bag with him, stating "No, there it is," and it was twice examined (R., 16). But no reference was made to the Gladestone bag (R., 22). Yet all this time customs inspectors on the train had been going to the baggage car and inspecting the Gladstone bag and the United States Customs seals placed thereon in Montreal, so that at the time of each of the inquiries these customs officers knew of the presence of this sealed bag in the baggage car but did not ask respondent about it (R., 17, 21, 24, 27, 34).

Upon arrival at the customs port of St. Albans, Vermont, these inspectors, together with representatives of the Collector of Customs at that port, took the respondent and the small bag which he carried to the Custom House at St. Albans (R., 18), and kept him there in one of the rooms (R., 29) while they interrogated him as to whether he had anything to declare. In reply to these inquiries he answered "No" (R., 42, 46). They then began an examination of his person and the hand bag which he carried (R., 46), but at no time either showed to him, or referred in any way to the Gladstone bag which had been checked, and which under its customs seal had been in the custody of the customs officials since leaving Montreal (R., 24).

This Gladstone bag was taken from the train to the baggage room at St. Albans, and from there to another room in the Custom House (R., 24) somewhere across the hall from the one in which respondent was being examined (R., 29). The transportation of this bag and its concealment in the other room was without either the knowledge or consent of respondent. During the examination of the respondent's person, and when he had removed his hat, coat, overcoat, collar, and neck tie, the customs officers for the first time asked for the key of his bag which he produced and pointed out among others keys in a bunch (R.,

36, 37, 46). One of the customs inspectors took this key and departed. Respondent then stated to the Deputy Collector, "I want to talk to you alone" to which the inspector replied, "You cannot speak to me alone, take off that shoe" (R., 46). Respondent then made another request to speak to the Deputy Collector, saying, "I have got to speak to you alone," and upon that request the Deputy Collector said, "Come into the other room." This was not the room in which the Gladstone reposed (R., 29). There respondent said to the Deputy Collector (R., 47), "I haven't the diamonds on my person, they are in my grip." Another inspector was then called into this room and respondent repeated his statement in the presence of this other inspector (R., 47).

The Deputy Collector then continued with the examination of the person of the respondent, and his small hand bag. After the completion of the search of respondent's person one of the inspectors came into the room and stated that he and the other inspector who had obtained the key from respondent had found the diamonds in the grip as respondent stated (R., 47). Even then respondent was not shown his bag nor the contents thereof, nor did he see them after that time until the trial.

No evidence was offered on behalf of the respondent, and upon the facts stated he was convicted of the charge submitted to the jury.

On appeal to the Circuit Court of Appeals respondent contended:

> 1. That the facts presented by the Government did not constitute the crime of smuggling under Section 593 (a) of the Tariff Act of 1922, and that said section was not applicable to the facts of this case.
>
> 2. That the District Court committed error in charging the jury as follows, due exception having been taken thereto (R., 70):

"If you find that the defendant falsely and fraudulently, intending to defraud the revenue of the United States, told Collector Whitehall and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this completed the offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the customs house, he admitted that he had some diamonds in his Gladstone bag."

3. That the indictment was fatally defective in failing to charge that the diamonds "should have been invoiced."

The Circuit Court of Appeals held that the facts as proven by the Government did not constitute the offense of smuggling under Section 593 (a) of the Tariff Act of 1922; that the District Court's charge to the jury as stated above was erroneous (R., 79); that the case was governed by the principle set forth by this court in Keck v. United States (172 U. S., 434), and on the 10th day of June, 1926, issued its mandate to the District Court for the District of Vermont reversing the judgment and conviction heretofore entered therein (R., 83) and on July 5, 1926, entered an order denying the petition of the petitioner herein for a rehearing (R., 83).

The Questions Before the Court.

The questions before the court may be set forth as follows:

1. Where an indictment charges smuggling of merchandise "subject to duty * * * without paying or accounting for the duty," is the crime of smuggling committed until the obligation to pay or account for the duty arises?

2. Does Section 593 (a) of the Tariff Act of 1922 cover articles carried on the person or in the baggage of passengers from territory contiguous to the United States?

3. Did not the failure to aver in the indictment that these diamonds were "merchandise which should have been invoiced" make the indictment fatally defective?

4. Can the Secretary of the Treasury by rules and regulations extend the scope of a criminal statute as is attempted to be done in this case under Article 224 of the Customs Regulations of 1923?

5. Did respondent on the facts proven by the Government in this case commit the crime of smuggling under Section 593 (a) of the Tariff Act of 1922 as charged in the indictment?

Summary of the Argument.

The administrative provisions of the Tariff Act of 1922 were an attempt to consolidate and re-enact all prior statutes governing the enforcement of the Customs laws.

Section 2865 R. S. was the smuggling statute. It had been construed by this court in Keck v. United States, 172 U. S., 474. It was re-enacted with some omissions as Section 593a of the Tariff Act of 1922, as a part of that consolidation plan.

The Keck case produced two conclusions. First—that the statute does not include attempts to smuggle. Second—that there can be no crime of smuggling until the obligation to pay duties arises.

Although the second conclusion is based partly on the phraseology of the statute, i. e., "without paying or accounting for the duty," which words have been omitted from the present statute—the action of the Government in the case at bar in charging this very omission in the indictment, creates the same question as that passed on in the Keck case.

This second conclusion however, is based upon the definition of "smuggling" as including within it, the avoidance of the obligation to pay or account for duties and the phraseology used in Section 2865, Revised Statutes is cited by this court only as corroborative of the definition which the court adopted.

The Tariff Act of 1922 and the Customs Regulations promulgated thereunder show a pronounced line of demarcation between ordinary commercial merchandise shipments and passengers' baggage. They make a further distinction between passengers' baggage from contiguous territory and from all other places.

All merchandise shipped in the ordinary commercial way must be invoiced and must also be declared in writing on entry.

Passengers' baggage need not be invoiced and the declaration thereof may be oral.

All baggage or other articles from Canada must be unladen and inspected *at the first port of arrival* in the United States. There, only, the obligation to enter, which has been defined in the Customs Regulations as "the transaction of passing merchandise through the Customs" can arise. In the case at bar respondent at that time was deprived of his baggage.

Customs Regulations of 1923, Articles 205 and 395 both provide that Customs Officers shall not open the baggage of passengers. Neither of these regulations was regarded by the officers in this case, who, without the respondent's knowledge and consent removed the Gladstone bag from the baggage car and concealed it in a room in the Custom House at St. Albans (R., 24) other than that in which the respondent was being examined (R., 29) and later after asking respondent for the key thereto proceeded to this other room and opened the bag with the key supplied (R., 37). The law contemplates examination of baggage in the presence of the passenger and this right of the passenger was totally disregarded.

In conducting the search of his person (R., 46), also without referring to the bag, at which time and before any obligation on his part arose to pay the duty, and before the search was completed, respondent mentioned to the Collector who was conducting the search, that in his Gladstone bag, the key to which was shortly before that time requested, were certain diamonds (R., 47).

Under these circumstances, and on the authority of the Keck case and the various decisions of the Circuit Courts of Appeal, the respondent made due entry of the diamonds and did not commit the crime of smuggling under Section 593 (a) of the Tariff Act of 1922.

On the authority of the rule evolved in the Keck case and followed by the lower courts, and in view of the laws and regulations existing at the time respondent entered the United States, and in view of the conduct of the customs officers, and in view of all the evidence adduced in the case at bar, the part of the charge of the District Court objected to was reversible error and the instructions of the court, if any, should have been the direction of a verdict of acquittal.

But notwithstanding the above rule, under Section 593 (a) the indictment as drawn is fatally defective in that it fails to charge that diamonds were merchandise "which should have been invoiced."

This is a material allegation and the omission in the present indictment renders the same invalid. The term "which should have been invoiced" is not merely descriptive but is one of the essential averments which must be proved to sustain a conviction under this section. This averment has been held to be so essential that an indictment under the 19th Section of the Act of August 30, 1842, which is the same substantially as 593 (a), was quashed, where the facts averred were the smuggling of goods from Canada on the ground that there was no requirement that goods coming in from Canada should be

invoiced, the only requirement at the time of the case being that a manifest be made at the first Custom House in the United States.

The averment "without causing said diamonds to be invoiced" is not equivalent to the clause "which should have been invoiced."

The former is a mere statement of an omission on the part of the respondent, the latter is an essential description of the goods themselves which informs the person indicted of the character or class of the goods he is alleged to have smuggled.

Section 593 (a) is distinctly a commercial merchandise provision which has no relation to passenger's baggage brought in from Canada.

ARGUMENT.

Section 593 (a) of the Tariff Act of 1922 provides as follows:

> "SMUGGLING AND CLANDESTINE IMPORTATION.—(a) If any person knowingly and wilfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces, into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the custom house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

Section 2865 Revised Statutes was the statutory predecessor of Section 593 above and it provided as follows:

R. S.—Sec. 2865.—"For Issuing False Invoice.—If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

At the time of the enactment of the Tariff Act of 1922, it was sought to consolidate in the administrative provisions of that act all the statutes relating to the enforcement of customs laws. Section 593 (a) was drawn and enacted to cover the crime of smuggling as it had been described in Section 2865 of the Revised Statutes and prior acts.

Section 2865 of the Revised Statutes reads: "*subject to duty by law, and which should have been invoiced, without paying or accounting for the duty.*" (Italics ours.)

Section 593a of the Tariff Act of 1922 contains only the provision "*which should have been invoiced.*" (Italics ours.)

It is obvious that Section 2865 of the Revised Statutes would not have supported a conviction for smuggling free merchandise, nor merchandise of a class permitted to be imported for exhibition purposes, nor animals for breeding purposes, none of which are subject to duty and none of which could be said to have been introduced "without paying or accounting for the duty." It probably would not have covered prohibited merchandise.

It was the evident desire to overcome this lack of scope of Section 2865, Revised Statutes which prompted Congress to omit from Section 593 (a) of the Tariff Act of 1922, the words "subject to duty by law," and the words "without paying or accounting for the duty" and to insert in their stead only the words "merchandise which should have been invoiced," adopting at the same time the judicial interpretation of the meaning of the words "smuggling" or "clandestinely introducing" as including the avoidance of the obligation to pay or account for the duty, interpreting this as rendering the inclusion of the words "subject to duty" and without paying or accounting for the duty as unnecessary.

Section 593 (a) would probably support a conviction for the smuggling of *any* merchandise no matter whether free or dutiable, permitted or prohibited, provided it was of the kind *which should have been invoiced.*

In Keck v. United States, 172 U. S., 434, the indictment charging smuggling under Section 2865, Revised Statutes contained the following averments:

> "• • • did knowingly, wilfully, unlawfully with intent to defraud revenue • • • smuggle and clandestinely introduce • • • certain diamonds • • • which should have been invoiced and duty thereon paid or accounted for, but which, to the knowledge of Keck and with intent to defraud • • • were not invoiced nor the duty paid or accounted for."

Count 3 of the indictment in the case at bar (supra), page 2, contains the following averments:

> "• • • did • • • unlawfully, wilfully, knowingly, and feloniously, with intent to evade payment • • • of duties • • • subject to the payment of duties to said United States and thereby defraud said United States and the revenue thereof, smuggle and clandes-

> tinely introduce * * * said merchandise * * * without making any declaration at any customs office * * * or to any customs officer, * * * to enter said diamonds into said United States, * * * without causing said diamonds to be invoiced for the purpose of ascertaining the duties on said merchandise, * * * and without paying or accounting for the duties, to which said * * * diamonds, was then and there subject, although said Leib Ritterman had an opportunity to do so. * * *"

It will thus be seen that although the words "subject to duty" and "without paying or accounting for the duties" were omitted from Section 593 (a) of the Tariff Act of 1922, both of these elements of the crime were included among the averments of Count 3 of the indictment in the case at bar.

It is therefore apparent that while Congress broadened the scope of Section 2865 R. S. in its enactment of Section 593 (a), the Government by the averments in Count 3 of the indictment has narrowed the scope of Section 593 (a) to exactly the crime covered by Section 2865, and which formed the basis of the indictment in Keck v. United States (supra).

It may then be safely said that the indictment in the case at bar and the indictment in Keck v. United States cover exactly the same crime charged in almost exactly the same words, and that the disposition of the indictment in Keck v. United States must necessarily be the disposition of the indictment in the case at bar.

One, at least, of the conclusions reached in the Keck case applies directly to Section 593 (a). This court there said:

> "Whatever may be the difficulty of deducing solely from the text of the statute a comprehensive definition of smuggling or clandestine introduction, two conclusions arise from the plain text of the law:

FIRST.—That whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to commit the offense referred to. It was indeed argued at bar that as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention overlooks the plain distinction between the attempt to commit an offense and its actual commission. If this premise were true, then every unlawful act which had a tendency to lead up to the subsequent commission of an offense would become the offense itself; that is to say, that one would be guilty of an offense without having done the overt act essential to create the offense, because something had been done which, if carried into further execution, might have constituted the crime. Second. That the smuggling or clandestine introduction of goods referred to in the statute must be 'without paying or accounting for the duty,' is also beyond question.

"From the first of the foregoing conclusions it follows that mere acts of concealment of merchandise on entering the waters of the United States, however preparatory they may be and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting clandestine introduction. From the second, it results that as the words, 'without paying or accounting for the duty' imply the existence of the obligation to pay or account at the time of the commission of the offense, which duty is evaded by the guilty act, it follows that the offense is not committed by an act done before the obligation to pay or account for the duties arises, al-

> though such act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. If this were not a correct construction of the statutes, it would result that the offense of smuggling or clandestine introduction might be committed as to goods, although entry of such goods had been made and all legal duties had been paid before the goods had been unshipped."

The first conclusion reached by the court has no reference whatever to the words "without paying or accounting for the duty," which words were omitted from Section 593 (a). Had Congress seen fit, following the decision in the Keck case, to remedy this defect in the law, it would have been a simple matter to have included within the terms of Section 593 (a) the crime of attempt to smuggle. The failure of Congress to do so, and the enactment of Section 593 (a) in substantially the same form as Section 2865 was such a legislative adoption of judicial decree or interpretation as to leave no doubt that Section 593 (a) was not intended to cover and did not cover such a crime as attempt to smuggle. Latimer v. United States, 223 U. S., 501.

It seems self evident that all the preliminary acts or omissions indulged in by the respondent in Montreal, on the train in Canada and the United States, and within the customs lines at St. Albans, were, as this court stated in the Keck case "but steps or attempts not alone in themselves constituting clandestine introduction."

Although the acts of the respondent may have tended to render possible a subsequent smuggling they can be construed as nothing more than attempts which did not merge into the completed crime by the commission of the necessary overt act, that is, the completion of the entry of the baggage without having disclosed the presence of the diamonds.

To obtain a proper perspective of this situation it is necessary to review the portions of the Tariff Act of 1922

having to do with the enforcement of the Customs laws, and to set forth at the same time those rules and regulations promulgated by the Secretary of the Treasury to carry such laws into effect.

It may first be stated as a general proposition that *entry* must be made of all merchandise, whether dutiable or free, and regardless of its value. (See Customs Regulations 1923, Article 255.)

Article 265, Customs Regulations of 1923 provides:

> "The term 'entry' has two meanings: First, the document filed in the Custom House, and second, the transaction of passing merchandise through the customs.
>
> The date of the entry in the first sense is the date the completed document is properly filed in the Custom House during office hours.
>
> The date of the entry in the second sense is the date when the custody of the Government ceases on imported merchandise."

The first class of entries has to do with the usual commercial importations and consists of a document according to a prescribed form which must be signed and declared to.

Section 484 of the Tariff Act of 1922 provides:

> "SEC. 484. ENTRY—(a) Except as provided in sections 490, 498, 522 and 553 and in subsection (d) of section 315 of this Act, the consignee of imported merchandise shall make entry therefore either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the Custom House *within forty-eight hours*, exclusive of Sundays and holidays, after the entry of the importing vessel or report of the vehicle, or after the arrival

at the port of destination in the case of merchandise transported in bond, unless the collector authorizes in writing a longer time."

(b) No merchandise shall be admitted to entry under the provisions of this section without the production of a certified invoice therefor." * * *

Section 498 of the Tariff Act of 1922 is an exception to the provisions of Section 484 and provides:

"The Secretary of the Treasury is authorized to prescribe rules and regulations for the declaration and entry of—

(6) Articles carried on the person or contained in the baggage of a person arriving in the United States."

"(b) The Secretary of the Treasury is authorized to include in such rules and regulations any of the provisions of Sections 484 or 485 of this Act."

The Secretary of the Treasury under the power conferred by Section 498 has not seen fit to include in the baggage regulations any of the provisions of either Section 484 or 485.

The Secretary did, however, under the authority of Section 498, promulgated Article 247, Customs Regulations 1923 which provides among other things, that "*consular invoices will not be required*," for (italics ours)—

"(6) Articles carried on the person or contained in the baggage of a person arriving in the United States."

Section 461, of the Tariff Act of 1922 provides:

"All merchandise and baggage imported or brought in from any contiguous country, except as otherwise

provided by law or by regulations of the Secretary of the Treasury, shall be unladen in the presence of and be inspected by a customs officer at the first port of entry at which the same shall arrive; *and such officer may require the owner*, or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise or other container, or of any closed vehicle, to open the same for inspection or *to furnish a key* or other means for opening the same." (Italics ours.)

The penalty for failure to comply with the provisions of Section 461, supra, are set forth in Section 462 of the Tariff Act of 1922.

Section 462 Tariff Act of 1922 provides:

"If such owner, agent, or other person *shall fail to comply with his demand*, the officer shall retain such trunk, traveling bag, sack, valise, or other container or closed vehicle, and open the same, and, as soon thereafter as may be practicable, examine the contents, and if any article subject to duty or any article the importation of which is prohibited is found therein, the whole contents and the container or vehicle shall be subject to forfeiture." (Italics ours.)

The Secretary of the Treasury under the authority conferred by Sections 498 and 461 of the Tariff Act of 1922 promulgated Articles 205 and 224 of the Customs Regulations of 1923.

Article 205, provides:

Art. 205 "INSPECTION—PENALTY.—All merchandise and baggage imported or brought into the United States from contiguous foreign territory, unless destined to an interior port in bond, shall be unladen in the presence of and inspected by a customs officer *at*

the first port of entry at which same shall arrive. Customs officers may require the owner or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise, or other container, or of any closed vehicle, to open same for inspection, to or furnish a key or other means for opening same.

Customs officers *should not open baggage* for the purpose of examining the contents. All baggage which is not opened by the owner or his agent should be held for examination until so opened, or a request received from the owner or his agent to make proper disposition thereof.

In the event the owner, agent, or person having charge of such container refuses to comply with the demand of the customs officer to open same, or produce the means of opening same, such container shall be retained in the custody of the customs, and examined as soon thereafter as practicable. On inspection, should any article subject to duty, or any article the importation of which is prohibited, be found, the whole contents, and the container or vehicle, shall be subject to forfeiture.

Declaration on Customs Form 6063 will be required for articles acquired abroad exceeding $25 in value.

For procedure relative to baggage moving forward under Bond from port of first arrival, see Article 402." (Italics ours.)

Much stress has been laid by the learned counsel for the United States on the portion of this transaction which took place in Montreal under the provisions of Article 224 of the Customs Regulations.

Article 224 provides:

ART. 224. "BAGGAGE EXAMINED ABROAD—DISPOSITIONS AT FIRST PORT OF ARRIVAL.—Baggage examined by inspectors of the United States customs stationed

at places in the Dominion of Canada, if containing no dutiable merchandise, will be corded, sealed, and forwarded under special manifest as herein provided, or placed in a sealed car or compartment and accompanied by a sheet manifest.

Dutiable articles and exemptions allowed, if any, will be indorsed on the manifests by examining inspectors for the information of the collector at the first port of arrival in the United States.

* * * * * * * * *

* * * * * * * * *

The card manifests will be placed on the cords back of the seal. When the inspector boards a train at the first port of arrival of the baggage, he will cut the cord and retain the manifest for filing in his office."

The foregoing Article of the Regulations providing for examination of baggage outside the territorial limits of the United States, while it may be justified as a convenience to passengers and to the Government, cannot have the force and effect of a statute. It is at best a permissive regulation, and certainly by no interpretation of the doctrine of legislative delegation of power, can it have the effect of making criminal that which was not criminal by the terms of the statute itself. (See United States v. Standard Brewing Co., 251 U. S., 210; 64 L. Ed., 229, also Eaton v. United States, 144 U. S., 677, 36 L. Ed., 591.)

In any event the only act by the Government officers in this case even remotely connected with Article 224 of the Regulations was the careful examination and sealing of this Gladstone Bag in Montreal (R., 12). From that moment on, the respondent and his hand baggage, as well as the Gladstone bag in the baggage car and at the Custom House, were handled in accordance with Article 205 of the Regulations, with the single exception that these Government officers followed the practice at the border ports of encouraging the making of oral declarations in-

stead of requiring written declarations on customs forms 6063 or 6059 (R., 16).

In the case at bar the first port of entry at which respondent arrived after leaving Canada was St. Albans, Vermont. (See Treasury Decision 39867, Appendix.) This was also the first scheduled stop of the train upon which respondent travelled, after leaving Canada (R., 20). The conductor or other person in charge of this train was required by Section 459 of the Tariff Act of 1922 to immediately report his arrival to the customs officer at the port of entry nearest to the place at which he crossed the boundary line and to produce to such customs officer a manifest. Respondent's Gladstone bag which was in the custody of the Government under customs seals placed thereon in accordance with Article 224 of the Regulations and manifested by the customs inspector at Montreal (R., 13) enabled the conductor or person in charge of this train to comply with the requirements of Section 459 and Section 460 of the Tariff Act of 1922, and to deliver a properly manifested article to the customs officers at the first port of arrival in the United States, that is, St. Albans.

Upon arrival at St. Albans the respondent could have taken advantage of the provisions of Article 402, Customs Regulations of 1923 to request the transportation company to forward this Gladstone bag under cord and seal and manifest, without examination or assessment of duty, to the port of New York as its ultimate destination. See Article 402, Customs Regulations, which provides:

> Art. 402. "SHIPMENT OF BAGGAGE IN BOND—MANIFEST.—When baggage appears by manifest of the importing vessel, or other satisfactory evidence, to be destined to a port of entry *other than the port of arrival*, it may be forwarded to its destination at the request of the passenger, the transportation company, or the agent of either, under cord and seal and bag-

gage manifest described below, without examination or assessment of duty. * * *"

While respondent had the right at this time to send his bag on to New York he did not have the opportunity as he did not see the bag, nor was he informed that it had even arrived at the port of St. Albans (R., 24).

Certainly at the port of St. Albans respondent could *not* have taken his Gladstone bag out of customs custody without a permit from the customs authorities as provided in Section 459 of the Tariff Act of 1922.

The statutes and the Regulations require that passengers' baggage from Canada shall be unladen and examined at the first port of entry in the United States, and that *there* duty, if any be due, should be paid, and that *there* entry, if any is to be required, must be made. None of these things happened in the case of the respondent. They were not permitted to happen.

These customs officers intent on making what they called a "positive case" (R., 20), unlawfully seized respondent's Gladstone bag from the baggage car or the baggage room of the railroad, and unlawfully and surreptitiously transported it to the Custom House at St. Albans (R., 20).

Contrary to what the learned Solicitor General for the United States so earnestly contends, respondent did not at any time have the slightest chance to have his Gladstone bag go through on the baggage check to New York.

These diamonds in their little paper packages take up quite a space, probably as much as the ordinary copy of the Federal Reporter. In their paper packages they make quite a rustle when moved. They were in these paper packages, with the exception of a very few, when the inspector at Montreal made his careful examination of this Gladstone bag. The only reason which can be advanced for this inspector not discovering some of these packages, in view of the fact that he had been told to watch for this

man (R., 14, 15), was that the inspector did not want to discover them. He wanted to allow this respondent to cross the border into the United States so that a so-called "positive case" could be made against him there.

Let us see then how this positive case idea was carried out in the Custom House at St. Albans.

Section 461 of the Tariff Act of 1922, and Article 205 of the Regulations specifically direct customs officers not to open baggage for the purpose of examining the contents. It further requires that the baggage shall be *unladen in the presence of, and inspected by customs officers at the first port of entry at which the same shall arrive*, and that such officers may require the owner of the baggage to supply a key for opening same, if the owner will not, or cannot, open the baggage himself. The *only penalty* provided in the law for the failure on the part of the passenger to comply with this request is the retention of the baggage in the custody of the customs and the examination at a later date, in which event should any article subject to duty be found the whole contents and the container shall be subject to forfeiture.

Article 395, Customs Regulations of 1923 providing for the examination of baggage and the collection of duties also states: "Customs officers will not open baggage for the purpose of examination. Any package which is not opened by the owner or his agent for examination should be treated as unclaimed."

There are good reasons for these requirements, the most important of which is that the opening of baggage by the owner, or by the customs officer in his presence, prevents the possibility of so-called "framed" cases by the insertion in such baggage of dutiable articles by someone other than the owner.

The respondent was taken from the train at St. Albans under guard to the Custom House and sequestered in a room therein (R., 18, 42). He was examined by various customs officers as to whether he had anything to declare

and specifically whether he had any diamonds to declare (R., 42, 46). He did not see, nor was he permitted to know, that the Gladstone bag was in the Custom House in another room, nor that it had even left the baggage car of the train upon which he had arrived (R., 29). Thus was committed by the customs officers charged with the enforcement of the law a breach of respondent's rights, and a violation of the statute and the regulations thereunder.

It was not until respondent was asked for the key to his Gladstone bag, that the baggage which started out under Regulations, Article 224, and was then proceeding under Regulations, Article 205, did he realize that these questions which were being directed to him might include the bag which had been examined by the customs inspector at Montreal and had been continuously in customs' custody since that time. At this moment, and before his examination and the inspection of his person were completed, he volunteered the information to the proper customs officers that he had diamonds in the Gladstone bag (R., 46, 47. No question could possibly arise under the circumstances in this case as to whether the diamonds were actually discovered by the customs inspector in another room across the hall before or after respondent mentioned them to the Deputy Collector, because the respondent had no means of knowing what these other inspectors were doing, and his voluntary declaration was made, before the Deputy Collector who was examining him could possibly have known that the diamonds had been discovered (R., 47).

The law does not contemplate an examination of different articles, in different places, away from the passengers, by different officers at the same time.

This question of voluntary disclosure even after denial of the existence of dutiable merchandise on the passenger's person, or in his baggage, has been the subject of a number of decisions.

In United States v. One Pearl Chain, 139 Fed., 510, Judge Holt, in directing a verdict for the defendant, made the following significant statement:

> "The article in this case is one of great value, but, of course, it is governed by the rules and regulations applicable to the importation of baggage, or articles upon the person. * * *
>
> As I look at the law in this case, the question of intent is immaterial * * * *if the persons who brought the goods here intended to smuggle them, they had an opportunity to change their minds down to the time when it was their duty to make the necessary declaration;* and in my opinion the Government cannot seize these goods as forfeited until the time has come when the person importing them has had an opportunity to declare them and has not done so. In my opinion, there is no evidence in this case that that time had come, and, therefore, I think there should be a verdict directed in this case for the claimant, and I will so direct." (Italics ours.)

In affirming that decision in 139 Fed., 513, the Circuit Court of Appeals for the Second Circuit stated the case and its decision as follows:

> "*Before she was called upon by the inspector to open her trunks and give him the information which her imperfect prior declaration made it her duty to give*, Theobold, the Special Treasury Agent, approached her, told her that he knew she had purchased a Pearl Necklace in Paris, which she had omitted to declare, and asked her to produce it. He testified, 'She at first said that she had one of her necklaces mended at Tiffany & Company's, and that she had not purchased any necklace, but being further pressed, said she had purchased a necklace.' In response to

his request that she produce it, she returned on board with him and her husband and gave it to him. (Italics ours.)

Thereupon he put it in his pocket and walked away with it. The fact that her jewelry had been thus seized and removed by officers of the Government was presumably the reason why she did not complete the entry by having the pearl chain added to the embroidered linen and the wearing apparel, and, in our opinion, she could not under such circumstances be held for failure to make declaration of entry; as was said in the Dodge case, 111 Fed., 165, 49 C. C. A. 287, 56 L. R. A., 130, 'If they make such an examination and find in the baggage and articles which they deem dutiable, they are to require due entry of them to be made, together with payment of the duties. If instead of requiring the passenger to make due entry of dutiable articles which such passenger produces, they elect to seize and remove them before the passenger is called upon to complete his entry, he is not to be held responsible for failure to include them in the itemized entry, provided he has mentioned them to the customs officer when he first made his entry.'" (Italics ours.)

Judge Wallace in a concurring opinion says (p. 517):

"It was seized upon her person, however, before any obligation on her part had arisen to pay or account for the duties. I agree, as the Supreme Court has so decided in the Kock case, that *until the obligation to pay or account for the duties arises the offense of smuggling is not complete* and no cause of forfeiture accrues." (Italics ours.)

In the case at bar, the obligation to pay or account for duties arose first at the custom house at the Port of St. Albans. These diamonds were not accompanied by a consular invoice and they were valued at over $500. Conse-

quently Article 395, Customs Regulations of 1923 requires regular entry at the custom house and regular appraisement. (See Article 395 set forth in Appendix, page 35.) The obligation on the part of respondent could not therefore arise until some time after the opening of the Gladstone bag and the appraisal of its dutiable contents. *Before this time arrived respondent declared the diamonds.* The Government does not claim that these diamonds could have been entered and appraised and duty paid prior to arrival at the Custom House at St. Albans.

In United States v. One Trunk, 184 Fed., 317, the Circuit Court of Appeals for the Second Circuit, speaking through Lacomb, Circuit Judge and citing U. S. v. One Pearl Necklace, 111 Fed., 164, 49 C. C. A., 287, 56 L. R. A., 130, and One Pearl Chain v. U. S., 123 Fed., 372, 59 C. C. A., 499; Dodge v. United States, 131 Fed., 849, 65 C. C. A., 603; United States v. One Pearl Chain, 139 Fed., 513, 71 C. C. A., 500, said at page 318:

> "we reached the conclusion that *if at any time while the entry is being made, and before it is completed, there is a disclosure by the passenger, which is sufficient to put the customs officers upon inquiry as to the dutiable character of any of the contents of the packages, we think that within the meaning of the statute it is to be deemed that the articles were mentioned to the collector before whom such entry was made.*" (Italics ours.)

The Pearl Chain case is on all fours with the case at bar. In both cases questions were asked of the passenger as to whether he had anything to declare; in both cases the passenger's answer was in the negative; in both cases subsequent questions of the same kind were asked and again denied; in both cases customs officers took the article or package out of the possession of the passenger prior to, or at the time when the obligation of the passenger to mention to the customs officers the dutiable articles and

pay the duty arose; in both cases the customs officers rendered it impossible for the passenger to so declare and pay duty; in both cases the passenger changed his mind about smuggling; in both cases the passenger voluntarily gave up the articles or property upon request therefor, and *before such articles or property had been discovered by the customs officers.* All these cases were before the Circuit Court of Appeals when the case at bar was decided by it and the principle enunciated thereunder was ratified and approved in its decision of the case at bar.

The learned counsel for the United States have cited the case of Newman v. United States, 276 Fed., 798, decided by the Circuit Court of Appeals for the Second Circuit, and contends that it is on all fours with the case at bar. The Newman case is representative of the class of cases distinguishable from those hereinbefore cited by one fact. This fact forms the single line of demarcation between the crime of smuggling and the mere unexecuted attempts to smuggle. The Newman case and those cited in connection therewith are all based upon the fact that dutiable articles *were found by the customs officers prior to any mention thereof by the passenger.* As was said in Dodge v. United States, 131 Fed., 849, the passenger did not *"while the entry was being made nor before it was completed make any declaration to the customs officer sufficient to put him upon inquiry as to the dutiable character of any of the contents of the packages of baggage*, and that subsequently upon examination of her hand bag the jewelry *was found.*

Respondent's Gladstone bag was produced to the customs officers, and consequently it could not be said that it was concealed or clandestinely introduced into the United States in any manner. Respondent had not passed the customs lines, nor had he completed his entry in the meaning of that term as defined in Art. 265, Cust. Reg. 1923, when he made the declaration of the dutiable articles.

Section 462 of the Tariff Act of 1922, providing for forfeiture in case the owner of baggage shall fail to comply

with the demand for the production of a key to open his baggage continues as follows:

> "And if any article subject to duty, or any article, the importation of which is prohibited *is found therein*, the whole contents of the container shall be subject to forfeiture."

Thus Congress has recognized the difference between a *disclosure* of dutiable merchandise and a *finding* thereof by customs officers.

If the principle evolved in the Keck case and followed by the Circuit Court of Appeals since, be the law, then it follows as a matter of course that the charge to the jury by the District Court as follows:

> "If you find that the defendant falsely and fraudulently, intending to defraud the revenue of the United States, told Collector Whitehill and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this completed the offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the Customs House, he admitted that he had some diamonds in his Gladstone bag,"

was reversible error, and the decision of the Circuit Court of Appeals should be affirmed.

Count 3 of the indictment is fatally defective in that it fails to allege that the diamonds were merchandise "which should have been invoiced." Section 593 (a) is distinctly a commercial merchandise provision which has no relation to passenger's baggage brought in from Canada.

Not only does Section 593 (a) provide for the clandestine introduction into the United States of "any merchandise which should have been invoiced," but provides for the making out, or passing, or attempting to pass through

the Custom House any false, forged, or fraudulent invoice. This provision is one of the material elements of which this particular offense is composed.

All the merchandise which Section 593 (a) can cover, including dutiable goods, free goods, goods in bond for export, American goods returned, prohibited goods imported on a permit, goods for exhibition purposes, cattle for breeding purposes, is required to be invoiced.

Passengers' baggage as shown above is *not* required to be invoiced.

That the words "which should have been invoiced" constitute a material element of the crime is set forth in Section 593 (a), is supported by the case of United States v. Smith (2 Blatchford, 127, 27 Fed. Case No. 16319), in which Mr. Justice Nelson of the Supreme Court of the United States, sitting in Circuit, on Error to the District Court of the Northern District of New York, *held* that the provisions of the Tariff Act of 1842 (which were exactly the same as the provisions of Section 2865 of the Revised Statutes) applied only to merchandise *which should have been invoiced*, and that as the Act of 1821 contained no provision for the invoicing of merchandise from Canada, such merchandise was not subject to a smuggling charge under that statute. The court said:

> "It is apparent that an *essential element* to constitute the offense under the 19th Section of the Act of 1842 is wanting in the importation of goods provided for in the Act of 1821. *There is nothing in the latter act requiring that they should be invoiced.* The system is a distinct one applicable to the frontiers adjacent to foreign territories. I am constrained, therefore, to differ from the court below, and to reverse the judgment there rendered." (Italics ours.)

Also in

> U. S. v. Nolton, 5 Blatch., 427, 27 Fed. Cases No. 15,897.

In the Circuit Court on Error to the District Court for Northern District of New York, July 11, 1867, the rule was restated.

This was a motion to quash an indictment against George B. Nolton for smuggling, founded on the 19th Section of the Act of August 30, 1842 (5 Stat., 565). The gravamen of the indictment was, smuggling from Canada into the collection district of Cape Vincent in the North District of New York, the indictment charged that the goods were liable to duties and *should have been invoiced* and the duties paid, but that they were brought in without an invoice and without the payment of duties.

Nelson, Circuit Justice.

The objection to the indictment is that the 19th Section of the Act of Aug. 30, 1842, does not apply to the case of goods imported from an adjacent foreign territory; and that such importations are governed by the Act of March 2, 1921 (3 Stat., 616) which requires only that a manifest of the goods, duly verified, shall be delivered to the Collector, and the duties paid, and that, in case of default, the goods shall be forfeited, together with the vessel or vehicle, and the party subject to a penalty of $400, altered and increased by the Act of March 3, 1923 (3 Stat., 781) to a penalty of four times the value of the goods. • • •

The omission of the words "which should have been invoiced" from the averments of the indictment constituted a failure to charge a crime with that degree of precision demanded by Congress. In the case at bar, the inclusion of this clause in the indictment would have advised the defendant that he was charged with smuggling merchandise for that is the only class of imported articles required to be invoiced. It would thus have brought the crime charged within the provision of the Tariff Act of 1922

and the Regulations thereunder having to do with merchandise and particularly would it have brought the crime charged within the provisions of Article 247 of the Customs Regulations of 1923 which give to the importer a period of forty-eight hours within which to make his entry after arrival at the first port of entry.

If these diamonds were merchandise "which should have been invoiced" then respondent was deprived of the legal period of forty-eight hours within which to make his entry by the unlawful seizure of this Gladstone bag by the Customs Officers.

If it was not intended to charge that these diamonds were "merchandise which should have been invoiced" then the averments of the indictment having to do with smuggling and clandestine introduction are not applicable to the state of facts shown to exist, as respondent brought into the United States only passengers' baggage.

The conclusions which may be drawn from a study of the Tariff Act of 1922 and of the regulations promulgated thereunder and which are justified under the facts in the case at bar, are:

1. That no invoice is required for passengers' baggage from Canada.

2. That no written declaration is required.

3. That baggage brought in under the regulations, Article 224 is in Government custody until delivered to the passenger at the first port of entry in the United States.

4. That at the first port of entry in the United States occurs for the first time the obligation to make entry and that entry must be understood to be the transaction of passing goods through the customs.

5. That the obligation to pay or account for duties does

not occur until arrival at the first port of entry in the United States and then only after examination and appraisal of the goods.

6. That such baggage must be inspected at the first port of arrival in the United States, and the only obligation on the passenger is to open it or to supply the key for that purpose.

7. That the only penalty for failure to comply with the request to open the baggage, or furnish a key therefor, is the forfeiture of the baggage, provided articles subject to duty or prohibited importation are found therein, and it should be noted that this provision of Section 462, Tariff Act of 1922 is limited to such dutiable articles as are "found therein." This unquestionably negatives the imposition of such a penalty in any case where, as was held by the Circuit Court of Appeals in the case of United States v. One Pearl Chain, supra, the presence of such dutiable merchandise or goods *is disclosed by the passenger, prior to the time of the completion of the examination.*

8. That the respondent having declared or mentioned to the Deputy Collector the existence of dutiable merchandise before his examination was completed and consequently during the process of making entry of his baggage, was not guilty of the crime charged in the indictment.

9. In the case at bar, the obligation of respondent was to have made a disclosure of the dutiable contents of the Gladstone bag, and, if the merchandise therein be considered passengers' baggage, he should have been permitted to have it appraised and pay duty thereon provided he either opened the bag at the request of the customs officers or supplied them with a key to open same. If, as was decided by this court in United States v. One Pearl Chain,

supra, the customs officers seized the bag before he had an opportunity to open it, or to advise the customs officers of dutiable goods contained therein, then he was not guilty even of an infraction of Section 461 of the Tariff Act of 1922, and much less was he guilty of the crime of smuggling as set forth in Section 593 of the Tariff Act of 1922.

Respectfully submitted,

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on the brief.